know also that there was some danger in crossing. They, therefore, must either abstain altogether from crossing, or, if they do so, be subject, as a matter of law, to the consequence of the reckless operation of the railway, without reference to the care exercised in the use of the street for the purpose of crossing. Indeed, the proposition would imply that everyone who used the public streets with the knowledge of a defect existing therein would be guilty, if an injury was by them suffered as a result of such defect, of contributory negligence, without the existence of any neglect whatever; for this would necessarily result from saying that one who had made a careful use of the streets was yet guilty of neglect in doing so. Reduced to its last analysis, the principle contended for but asserts that the ordinary rules by which negligence is to be determined do not apply to the use of the public streets, since those who use such streets with a knowledge of a possible danger to arise from a defect therein must, as a matter of law, have negligence imputed to them, although in choosing to make use of the streets, and in the mode of use, the fullest possible degree of judgment and care was exercised. The result of this would be to relieve the municipality of all duty and consequent responsibility concerning defects in highways, provided only it chose to give notice of the existence of the defects. . . . . Such a doctrine is inconsistent with reason, and, as we shall now proceed to point out, is in conflict with what we deem to be the weight of authority."

FEDERAL ANTI-TRUST ACT—WHAT CONTRACTS DO AND WHAT DO NOT VIOLATE—ATTEMPTS TO MONOPOLIZE A PART OF INTERSTATE COMMERCE.—Every contract, combination, or conspiracy, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, is in restraint of interstate commerce, and violates section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

Acts, contracts, and combinations *which promote, or only incidentally or indirectly restrict*, competition in commerce among the states, while their main purpose and chief effect are to foster the trade and increase the business of those who make and operate them, are not in restraint of interstate commerce, or violative of section 1 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

The anti-trust act should have a reasonable construction—one which tends to advance the remedy it provides, and to abate the mischief at which it was leveled.

Every attempt to monopolize a part of interstate commerce, the necessary effect of which is to stifle or to directly and substantially restrict competition in commerce among the states, violates section 2 of the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200].

Attempts to monopolize a part of commerce among the states which promote, or only incidentally or indirectly restrict, competition in interstate commerce, while their main purpose and chief effect are to increase the trade and foster the business of those who make them, were not intended to

be, and were not, made illegal or punishable by section 2 of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], because such attempts are indispensable to the existence of any competition in commerce among the states.

A manufacturer, a corporation, and its employee restricted the sales of its products to those who refrained from dealing in the commodities of its competitors by fixing the prices of its goods to those who did not thus refrain so high that their purchase was unprofitable, while it reduced the prices to those who declined to deal in the wares of its cempetitors so that the purchase of the goods was profitable to them. The plaintiff applied to purchase, but refused to refrain from handling the goods of the corporation's competitors, and sued it for damages caused by the refusal of the defendants to sell their commodities to him at prices which would make it profitable for him to buy them and sell them again. *Held*, the restriction of their own trade by the defendants to those purchasers who declined to deal in the goods of their competitors was not violative of the anti-trust act.

The owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy by the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and are not actionable, because they are not the result of any breach of duty or of contract by the owner. *Whitwell* v. *Continental Tobacco Co.* (C. C. A. 8th Circuit), 125 Fed. 454.

This is an important contribution to the case-law of this subject. The first two points, *supra*, suggest that this much bethumped and court refined act is in nearly the last stages of tuberculosis, when a case is to go off upon a judicial distinction between acts which directly and substantially restrict competition and those which restrict, but only incidentally or indirectly. The spirit of the act would seem to forbid *any* act, contract, combination or conspiracy, large or small, direct or indirect, and the opening of the door to such distinctions among the thousand forms of attempted evasions of its provisions seems to us unfortunate—a judicial permission for the beginning of strife which can only result, as of old, in the letting out of much water.

In our view, it was not necessary for the court to have used this language. It might well have confined itself to the facts of the case, and, without attempting to define violations of the Sherman Act, held simply that the act complained of was not a violation. Upon this point the opinion of the court, by Sanborn, Circuit Judge, is in part as follows:

"In the contract, combination, or conspiracy which is charged against the defendants in this case there is nothing of this character.(1) The tobacco company is a manufacturer and trader, and McHie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such contract, combination, or conspiracy between them can be a violation of this law unless it is in restraint of interstate commerce; and the only combination charged against the defendants is

(1) i. e, having the effect either to stifle competition entirely, or to substantially restrict it.

their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their goods and the terms at which they would dispose of them to all intending purchasers."

The entire decision might have been rested upon the last point in the syllabus, *supra*, as to which the court says:

"There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less, at prices so low that he could realize a profit by selling them again to others. The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants, and the judgment below is affirmed."—EDITOR VIRGINIA LAW REGISTER.